Supreme Court, U.S.
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2001

No. 01-

IN THE

Supreme Court of the United States

MAGIC CHEF COMPANY,

Petitioner,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

28 U.S.C. § 2410(a)(1) waives the sovereign immunity of the United States in actions to quiet title over real or personal property in which the United States claims an interest. The interpretation of "quiet title" within the context of Section 2410 is extremely important; both because it defines the scope of the United States' waiver of sovereign immunity in property rights actions, and because Section 2410 is usually the only sovereign immunity waiver available to a private party engaged in a property rights dispute with the government. Any uncertainty as to what qualifies as a quiet title action under 2410 will therefore have an adverse impact on private property rights nationwide. Additionally, whether a given action is classified as a suit to quiet title, or as another type of action, such as one for lien foreclosure, will determine the procedures a private party must follow in order to maintain a waiver of sovereign immunity against the United States. In a quiet title action against the United States, a public sale of the underlying property is not required. *See* 28 U.S.C. § 2410(c). In a lien foreclosure action, the underlying property must be sold at public sale in order to maintain the sovereign immunity waiver. *Id.* The decision of the Eleventh Circuit in the present case conflicts with decisions of the First, Fifth, Seventh, Eighth and Ninth Circuits as to which types of actions may properly be considered actions to quiet title within the meaning of 28 U.S.C. § 2410(a)(1) and with decisions of this Court regarding statutory waivers of sovereign immunity.

The question presented is what constitutes an action to quiet title under 28 U.S.C. § 2410(a)(1).

STATEMENT PURSUANT TO RULE 29.6

Petitioner MAGIC CHEF COMPANY states that MAYTAG, INC. is its corporate parent and that no other publicly held company owns ten percent (10%) or more of MAGIC CHEF COMPANY's stock.

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Petitioner respectfully petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The District Court Opinion of July 27, 1999 (per Ferguson, D.J.) reinstating its March 27, 1996 Order granting Petitioner's Motion for Summary Judgment is not published and is contained within Petitioner's Appendix ("Pet. App.") at 13a. The March 27, 1996 Order is not published and is contained within Petitioner's Appendix at 20a. The Final Judgment in favor of Petitioner entered by the District Court on July 31, 1999 is contained within Petitioner's Appendix at 15a.

Neither the Eleventh Circuit Court of Appeals Opinion (per George, Lloyd D., Senior D.J., sitting by designation joined by Barkett and Wilson), reversing (Pet. App. 1a), nor its Order denying rehearing (Pet. App. 41a), are published.

STATEMENT OF JURISDICTION

The Eleventh Circuit Court of Appeals entered its Opinion and Order thereon on June 26, 2001. Pet. App. 1a. Rehearing was denied on October 12, 2001. Pet. App. 41a. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2410:

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter

(1) to quiet title to,

(2) to foreclose a mortgage or other lien upon,

(3) to partition,

(4) to condemn, or

(5) of interpleader or in the nature of interpleader with respect to, real or personal property on which the United States has or claims a mortgage or other lien.

* * *

(c) A judgment or decree in such action or suit shall have the same effect respecting the discharge of the property from the mortgage or other lien held by the United States as may be provided with respect to such matters by the local law of the place where the Court is situated. However, an

action to foreclose a mortgage or other lien, naming the United States as a party under this section, must seek judicial sale. A sale to satisfy a lien inferior to one of the United States shall be made subject to and without disturbing the lien of the United States, unless the United Sates consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled.

* * *

Section 713.15, Florida Statutes:

If for any reason the completion of an improvement is abandoned or though the improvement is completed, materials delivered are not used therefor, a person who has delivered materials for the improvement which have not been incorporated therein and for which he or she has not received payment may peaceably repossess and remove such materials or replevy the same and thereupon he or she shall have no lien on the real property or improvements and no right against any persons for the price thereof, but shall have the same rights in regard to the materials as if he or she had never parted with their possession. This right to repossess and remove or replevy the materials shall not be affected by their sale, encumbrance, attachment, or transfer from the site of improvement, except that if the materials have been so transferred, the right to repossess or replevy them shall not be effective as against a purchaser or encumbrancer thereof in good faith

whose interest therein is acquired after such transfer from the site of the improvement or as against a creditor attaching after such transfer. The right of repossession and removal given by this section shall extend only to materials whose purchase price does not exceed the amount remaining due to the person repossessing but where materials have been partly paid for, the person delivering them may repossess them as allowed in this section on refunding the part of the purchase price which has been paid.

Section 78.068, Florida Statutes:

(1) A prejudgment writ of replevin may be issued and the property seized delivered forthwith to the petitioners when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts shown by the verified petition or by separate affidavit of the petitioner.

(2) This prejudgment writ of replevin may issue if the court finds, pursuant to subsection (1), that the defendant is engaging in, or is about to engage in, conduct that may place the claimed property in danger of destruction, concealment, waste, removal from the state, removal from the jurisdiction of the court, or transfer to an innocent purchaser during the pendency of the action or that the defendant has failed to make payment as agreed.

(3) The petitioner must post bond in the amount of twice the value of the goods subject to the writ or twice the balance remaining due and owing, whichever is lesser as determined by the court, as security for the payment of damages the defendant may sustain when the writ is obtained wrongfully.

(4) The defendant may obtain release of the property seized under a prejudgment writ of replevin by posting bond within 5 days after serving of the writ in the amount of 1 1/4 the amount due and owing on the agreement for the satisfaction of any judgment which may be rendered against the defendant.

(5) A prejudgment writ of replevin shall issue only upon the signed order of a circuit court judge or a county court judge.

(6) The defendant, by contradictory motion filed with the court within 10 days after service of the writ, may obtain the dissolution of a prejudgment writ of replevin unless the petitioner proves the grounds upon which the writ was issued. The court shall set down such motion for an immediate hearing. This motion shall be in lieu of the provisions of subsection (4).

STATEMENT OF THE CASE

A. Summary.

Petitioner MAGIC CHEF COMPANY ("MAGIC CHEF") repossessed certain unused appliances from a United States Department of Urban Development ("HUD") controlled development, following default by the developer. Repossession was accomplished by court order pursuant to Fla. Stat. § 713.15, which allowed MAGIC CHEF to assert its right as owner of the appliances. The District Court held that MAGIC CHEF's action was one to quiet title under 28 U.S.C. § 2410(a)(1), resulting in a waiver of sovereign immunity by the United States. Pet. App. 13a. The Eleventh Circuit reversed, holding that a 713.15 action is not a quiet title action, but an action to foreclose a lien under 2410(a)(2), resulting in no waiver of sovereign immunity absent public sale of the underlying property. *Id.* at 1a. The decision of the Eleventh Circuit is worthy of immediate review by this Court as it brings into doubt the scope of the United States' waiver of sovereign immunity in disputes over real and personal property, injects doubt into the status of property rights nationwide, conflicts with decisions of the First, Fifth, Seventh, Eighth and Ninth Circuit Courts of Appeals and is inconsistent with prior decisions of this Court.

B. Background.

This case involves the recovery by MAGIC CHEF of appliances delivered but not paid for, used, or incorporated by Bonaventure Retirement Associates ("Bonaventure").[1]

1. Bonaventure was the developer for an apartment housing project located in Broward County, Florida which was constructed with a HUD insured mortgage.

The appliances at issue were delivered to Bonaventure approximately between July 30, 1988, and July 26, 1989. Following non-payment by Bonaventure, MAGIC CHEF brought suit against Bonaventure to obtain recovery of the appliances. During the course of litigation, Bonaventure and MAGIC CHEF entered into a settlement pursuant to which MAGIC CHEF was entitled to recover the appliances from the property. HUD was aware of the litigation between MAGIC CHEF and Bonaventure, the fact of non-payment by Bonaventure, and the terms of the settlement reached. Pet. App. 20a-21a.

Following the settlement, MAGIC CHEF sought HUD's cooperation in removing the appliances from the project (by this time, HUD was in control of the property) following Bonaventure's default on its mortgage. HUD repeatedly and continuously denied MAGIC CHEF the option of voluntarily repossessing the appliances. *Id.*

C. Course of Proceedings in State Court.

Suit was thereafter filed in state court by MAGIC CHEF against HUD. In its suit against HUD, MAGIC CHEF sought return of the appliances pursuant to Fla. Stat. § 713.15 and in the alternative claimed it had a lien superior to that asserted by HUD. *Id.*

In accordance with Section 713.15, MAGIC CHEF went before the state court to obtain a pre-judgment writ of replevin. Pursuant to statute, at the time the writ was issued, MAGIC CHEF was required to post a bond in the amount of $300,000.00, or twice the estimated value of the appliances plus interest. *Id.*

The pre-judgment writ of replevin was issued by the state court and allowed MAGIC CHEF to enter onto the project and repossess the appliances at issue. Fla. Stat. § 78.068 allows any party against whom a pre-judgment writ of replevin is issued to file a motion with the court issuing the writ for the purpose of having the writ dissolved and to obtain an "immediate hearing" thereon. HUD never moved for dissolution of MAGIC CHEF's writ of replevin.

In accordance with Florida law and in order to mitigate its damages, MAGIC CHEF thereafter sold the appliances in a commercially reasonable manner for the sum of $119,240.00. Had the appliances not been sold expeditiously, they would have rapidly declined in value, to the detriment of all parties to the action.

D. Course of Proceedings in Federal Court.

In March, 1992, HUD removed this action to federal court pursuant to 28 U.S.C. § 1441. HUD later filed an Answer to the Complaint and a Counterclaim pursuant to 28 U.S.C. § 1345, for conversion, abuse of process, and wrongful replevin. *Id.*

On or about June 14, 1993, sixteen (16) months after HUD was first served, HUD for the first time raised jurisdictional defects citing to 28 U.S.C. § 2410 and sought dismissal or summary judgment against MAGIC CHEF based solely on jurisdictional grounds. Despite the fact that the motion by HUD was purely jurisdictional in nature, the district court (per Ungaro-Benages, D.J.) by order dated January 4, 1994, nevertheless granted summary judgment in favor of HUD. *Id.* at 27a-40a. The case was then transferred to District Judge Wilkie D. Ferguson, Jr., with HUD's counterclaim still pending.

MAGIC CHEF moved to vacate the order granting summary judgment as it was clearly in error. Specifically, the law is clear that on a motion to dismiss where jurisdiction is at issue, the court should generally only dismiss a case without prejudice, giving leave to amend. HUD conceded this fact in its memorandum of law in opposition to MAGIC CHEF's motion to vacate, but still argued that leave to amend, while generally freely given, should not be granted in this case as it would be "futile".

The court amended the January 4, 1994, order so as to provide MAGIC CHEF with leave to file an amended complaint, which was done. HUD again answered and reasserted its counterclaim. MAGIC CHEF moved to dismiss HUD's counterclaim causes of action for abuse of process and wrongful replevin as they failed to state a claim. This motion was granted by the court on February 8, 1996. On February 23, 1996, MAGIC CHEF moved for summary judgment on its claims against HUD. The court granted the motion for summary judgment, and in doing so made a number of important findings of fact and law. *Id.* at 20a-25a.

First, the court concluded that the type of recovery initiated by MAGIC CHEF was an action to quiet title rather than an action to foreclose on a lien per the provisions of 28 U.S.C. § 2410. Such an action does not require a public sale of the property at issue, and therefore the court concluded that it maintained jurisdiction over MAGIC CHEF's claims pursuant to 28 U.S.C. § 2410(a)(1). *Id.* at 22a-23a. The court then held that, on the merits, MAGIC CHEF was entitled to recover the appliances at issue.[2]

2. As a secondary, additional basis for its decision, the court also held that due to its course of conduct, HUD was equitably estopped from challenging and/or had waived its challenge to MAGIC CHEF's pre-judgment replevin.

HUD filed a motion to vacate, alter, or amend the summary judgment in favor of MAGIC CHEF. The primary basis for the motion was set forth not within the pleading itself, but rather in an exhibit consisting of an unsigned motion for summary judgment, which motion was not at issue and which had never been filed with the court. The motion to vacate failed to raise any new grounds on which the court might reconsider its decision. The unfiled, unsigned "summary judgment" exhibit did argue to the court that the goods at issue were not capable of being "incorporated" into the premises, and therefore could not be recovered under § 713.15.

Apparently accepting the argument made in HUD's "summary judgment" exhibit, that the goods at issue could not be incorporated, the court ruled that the appliances could not have been replevied by MAGIC CHEF under § 713.15. *Id.* at 16a-18a.[3] Significantly, however, the court did not alter its ruling, as set forth in its Order of March 27, 1996, that the action initiated by MAGIC CHEF under § 713.15, was one to quiet title within the meaning of 28 U.S.C. § 2410(a)(1). Summary judgment was then entered in favor of HUD on the only remaining count in its counterclaim (conversion) despite the fact that HUD had never filed the "summary judgment" exhibit as a motion before the court

3. A review of both HUD's motion to vacate and the court's order granting the motion is certainly instructive. The motion itself does not contain any argument whatsoever that the appliances at issue are not capable of incorporation pursuant to § 713.15. This argument only appears in the "summary judgment" exhibit to the motion. It is clear from the court's order that its only basis for reconsidering its decision were the questionable representations set forth by HUD regarding the facts of the case and the state of the law on incorporatability of appliances.

and no summary judgment on HUD's behalf was pending. *Id.*

In response, MAGIC CHEF quickly filed its own motion to vacate with the court, pointing out that: (i) HUD had failed to raise any new issue which would allow the court to reconsider its decision; (ii) the only case law in Florida dealing specifically with the recovery of kitchen appliances had found that they *were* the type of items which could be incorporated into a project, and were properly subject to 713.15 recovery; (iii) no contrary cases had been presented by HUD; and (iv) the undisputed facts showed the appliances were intended to be incorporated but had not yet been incorporated at the time the goods were recovered. Realizing its error, perhaps made due to the long hiatus between HUD's submission of its motion to vacate and the court's consideration of the motion, the District Court reinstated its original order granting summary judgment in favor of MAGIC CHEF on the merits and against HUD on all claims. *Id.* at 13a-14a. On July 31, 1999, the court entered final judgment in favor of MAGIC CHEF. *Id.* at 15a.

E. Course of Proceedings on Appeal.

The Eleventh Circuit reversed the ruling of the District Court. *Id.* at 1a-12a. This reversal was based solely upon the Eleventh Circuit's conclusion that MAGIC CHEF's suit was not a quiet title action within the meaning of 28 U.S.C. § 2410(a)(1). The Appellate Court held that as there was no waiver of sovereign immunity by the United States, the District Court did not properly have jurisdiction over MAGIC CHEF's claims. *Id.*

In reaching this result, the Court, citing to its past decision in the case of *Raulerson v. United States*, 786 F.2d 1090 (11th Cir. 1986), concluded that "Section 2410 waives sovereign immunity only in *actual* quiet title actions, not suits analogous to quiet title actions." *Id.* at 7a (emphasis in original). Although the statute under which MAGIC CHEF repossessed the appliances at issue states that the party recovering the materials retains ownership, as opposed to lien rights, in the appliances, the court held that the action at issue more closely resembled a lien foreclosure suit than an action to quiet title. *Id.* at 7a-11a.[4]

The decision of the Eleventh Circuit is significant in that it relies entirely upon *Raulerson* for the proposition that Section 2410 applies only to "actual" quiet title actions. Significantly, *Raulerson* cites no legal authority whatsoever in support of this proclamation. Further, the *Raulerson* decision was premised on the fact that the plaintiff, as part of a criminal plea agreement, had previously forfeited and waived any claim to the property at issue. "Raulerson in this suit does not seek a determination of who owns the Osceola property." *Raulerson, supra.* at 1092.

In issuing its opinion, the Eleventh Circuit obviously recognized that its holding and reasoning conflicted with the prior decisions of the First Circuit, most notably *Progressive*

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4. Section 713.15 states that the party repossessing or replevining goods retains "no lien on the real property or improvements and no rights against any persons for the price thereof, but shall have the same rights in regard to the materials as if he or she had never parted with their possession." With a slight variation in language, this has been the law in Florida since 1935. *See In the Matter of Lowery Brothers v. Davis Water & Waste*, 589 F.2d 851, 856 (5th Cir. 1979).

Consumers Fed. Credit Union v. United States, 79 F.3d 1228 (1st Cir. 1996). *Id.* at 10a. The Eleventh Circuit's decision also conflicts with a past (and, indeed, binding) decision of the Fifth Circuit, *United States v. Morrison*, 247 F.2d 285 (5th Cir. 1957) as well as decisions of the Seventh, Eighth and Ninth Circuit Courts of Appeals.[5] The Eleventh Circuit in its opinion certainly endeavors to avoid the consequences of the conflicts which its decision creates.

While the Eleventh Circuit held Section 2410 only applies to "actual" quiet title actions and not to actions involving disputes over lien priority; it also recognized that *Progressive* and *Morrison* found that Section 2410 "provided jurisdiction to secure a declaration *as to priorities over government tax liens*." *Id.* (emphasis supplied). Faced with this fundamental conflict in the interpretations of Section 2410, the Eleventh Circuit nevertheless concluded that neither *Progressive* nor *Morrison* would require a different result in the present case. Pet. App. 10a.

In an attempt to somehow distinguish the present case with *Progressive* and *Morrison*, the Eleventh Circuit has characterized the current action as one dealing ". . . with the *creation* of a lien in a *non-title holder* and the subsequent vesting of title for repossession or replevy as propounded by Section 713.15." *Id.* (emphasis supplied). This characterization flies in the face of the plain language of Section 713.15, which states that anyone proceeding under this section "shall have no lien" on the property repossessed or replevied and shall have the same rights as if the goods had never left the Plaintiff's possession; *i.e.*, ownership

5. The Eleventh Circuit has adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

rights.[6] The record and pleadings below unequivocally show that the present case has always involved a dispute over the ownership of the goods at issue.[7]

The opinion of the Eleventh Circuit was filed on June 26, 2001. Pet. App. 1a. MAGIC CHEF's Petition for Rehearing was denied on October 12, 2001. *Id.* at 41a.

This Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's holding merits this Court's immediate review as it: (i) creates uncertainty in property rights nationwide; (ii) creates uncertainty as to the scope of the United States' waiver of sovereign immunity in property disputes; (iii) creates uncertainty as to the procedures to be followed in disputes over property rights to which the United States has been named a party; (iv) conflicts with the established precedent of the First and Fifth Circuit Courts of Appeals as well as with decisions of the Seventh, Eighth and Ninth Circuit Courts of Appeals; and (v) conflicts with the established precedent of this Court regarding statutory interpretation in general and of Section 2410 in particular.

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6. State law controls the determination of the nature of the legal interest a taxpayer may have in property. *Estate of Johnson*, 836 F.2d 940, 945-46 (5th Cir. 1988).

7. Even if the present action *were* characterized as a lien priority dispute, the Eleventh Circuit's holding would still conflict with the holdings of the other Circuits. *See Progressive*, *supra*.

I. The Decision of the Eleventh Circuit Creates Uncertainty and Inconsistency in Private Property Rights Nationwide and Brings Into Doubt the Scope of the United States' Waiver of Sovereign Immunity Under Section 2410.

Section 2410 was passed in order to create a means by which private parties could assert their property rights against the government of the United States and is often the only available statutory waiver of sovereign immunity in property rights disputes. *United States v. Brosnan*, 363 U.S. 237, 246, 80 S. Ct. 1108, 1114, 4 L. Ed. 2d 1192 (1960). As a result, the scope and meaning of Section 2410 is crucial to the protection of private property rights nationwide.

Following the decision of the Eleventh Circuit in this case, the property rights of private parties involved in disputes with the government are different in the Eleventh Circuit than in the jurisdictions of other Circuit Courts of Appeals. On the same sets of facts, sovereign immunity will be waived in other Circuits, but not in the Eleventh. In those Circuits which have not ruled on the scope of Section 2410, property owners are left without any guidance as to whether they can make a claim against the government or, if so, what procedures (public sale versus no public sale of the underlying property) must be followed to maintain the government's waiver of sovereign immunity.

This Court in the past has recognized that issues concerning the scope of the United States' waiver of sovereign immunity are of substantial importance and merit certiorari review. *Malone v. Bowdoin*, 369 U.S. 643, 82 S. Ct. 980, 8 L. Ed. 2d 168 (1962); *United States v. Williams*, 514 U.S. 527, 115 S. Ct. 1611, 131 L. Ed. 2d 608 (1995).

While disputes between private parties and the government over real and personal property arise in a myriad of contexts, they most often arise in actions involving tax liens.[8] Matters which may affect the administration of the tax laws merit consideration by this Court. *Brosnan*, *supra.* Immediate review of the Eleventh Circuit's decision in this case is also needed as the issue of the proper scope and interpretation of 2410(a)(1) comes up before District Courts across the nation on a regular basis, magnifying and exacerbating the effect of any uncertainties regarding the scope of the government's waiver of sovereign immunity under this statute. *See In the Matter of Greenwell Trust*, 2001 WL 361585 (D. Haw.); *Federal National Mortgage Association v. Internal Revenue Service*, 2001 WL 260076 (E.D.N.Y.); *Contimortgage Corp. v. United States*, 109 F. Supp. 2d 1038 (D. Minn. 2000); *Stackhouse v. Morgan*, 1999 WL 1427759 (E.D. Va.); *Brightwell v. United States*, 805 F. Supp. 1464 (S.D. Ind. 1992).[9]

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8. *United States v. Brosnan*, 363 U.S. 237, 80 S. Ct. 1108, 4 L. Ed. 2d 1192 (1960); *Estate of Johnson v. United States*, 836 F.2d 940 (5th Cir. 1988); *Progressive Consumers Fed. Credit Union v. United States*, 79 F.3d 1228 (1st Cir. 1996); *United States v. Coson*, 286 F.2d 453 (9th Cir. 1961).

9. **All** of these decisions conflict with the decision of the Eleventh Circuit in the instant action, and hold that Section 2410(a)(1) applies to lien priority disputes.

II. The Decision of the Eleventh Circuit Creates a Conflict Between the Eleventh Circuit Court of Appeals and the Courts of the First, Fifth, Seventh, Eighth and Ninth Circuits Regarding What Constitutes a Quiet Title Action Within the Meaning of Section 2410.

Section 2410(a)(1) states that the sovereign immunity of the United States will be waived in a suit to quiet title to real or personal property in which the United States has or claims an interest. Prior to the Eleventh Circuit's decision in this case, various of the Circuit Courts of Appeals have interpreted Section 2410(a)(1) quiet title actions as encompassing disputes concerning both the validity and priority of liens.[10] This view of 2410 has long been the law in the Fifth Circuit, (predecessor to the Eleventh) pursuant to *United States v. Morrison*, 247 F.2d 285 (5th Cir. 1957). The decision of the Eleventh Circuit in the instant action represents a sharp departure from the accepted interpretation of quiet title under 2410.

The case most widely cited and relied upon by both Circuit Courts of Appeals and District Courts regarding the interpretation and scope of Section 2410(a)(1) is *Progressive Consumers Fed. Credit Union v. United States*, 79 F.3d 1228 (1st Cir. 1996). This case is additionally instructive as the government in the *Progressive* case took the same position adopted by HUD in the instant action.

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10. *Progressive Consumer Fed. Credit Union v. United States*, 79 F.3d 1228 (1st Cir. 1996); *United States v. Morrison*, 247 F.2d to 285 (5th Cir. 1957); *Estate of Johnson v. United States*, 836 F.2d 940 (5th Cir. 1988); *United States v. Coson*, 286 F.2d 453 (9th Cir. 1961); *Harmon v. United States*, 101 F.3d 574 (8th Cir. 1996); *Harrell v. United States*, 13 F.3d 232 (7th Cir. 1993).

The government in *Progressive* argued that the case before the court was really a lien foreclosure action, not one to quiet title, and therefore there had been no waiver of sovereign immunity by the United States. In rejecting the government's overly restrictive interpretation of 2410, the First Circuit entered into a thoughtful and detailed analysis of Section 2410, its purpose and legislative history, as well as an analysis of interpretive decisions from other Circuits. The court concluded that "a careful reading of the authorities . . . does not support the government's narrow portrayal of the relief available to quiet title Plaintiffs." *Id.* at 1232.

> . . . while a priority claim of the sort raised by *Progressive* has not yet been decided by this Circuit, we have held and reaffirm today that Section 2410(a)(1) controversies encompass disputes concerning both the validity and priority of liens, as distinguished from actions seeking their extinguishment in a manner not permitted by the statutes.

(citing *Remis v. United States*, 273 F.2d 393, 394 (1st Cir. 1960)). *Id.* at 1232-33.[11]

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11. In holding that lien disputes could properly be considered quiet title actions within the meaning of Section 2410(a)(1), the First Circuit relied on the holdings of other Circuit Courts of Appeals and District Courts including *Remis, supra.*; *United States v. Morrison*, 247 F.2d 285, 289 (5th Cir. 1957); *Estate of Johnson v. United States*, 836 F.2d 940 (5th Cir. 1988); *Brightwell v. United States*, 805 F. Supp. 1464 (S.D. Ind. 1992) (citing *McEndree v. Wilson*, 774 F. Supp. 1292, 1295-96 (D. Colo. 1991)); *United States v. Coson*, 286 F.2d 453, 457 (9th Cir. 1961) as well as legislative history at H.R. Rep. No. 1191, 77th Cong. 1st Sess. 2 (1941); S. Rep. No. 1646, 77th Cong. 2d Sess. 2 (1942).) All of these authorities conflict with the decision of the Eleventh Circuit in the present case.

The First Circuit also expressly rejected the government's argument that *Raulerson* and its reference to "actual" quiet title actions required a more restricted interpretation of Section 2410. *Id.* at 1233. "Consistent with the broad construction accorded Section 2410's quiet title provision by a number of other jurisdictions, we hold that the *Progressive* claim falls within the meaning and scope of the statute." *Id.*[12]

In contrast, the Eleventh Circuit in the present case relied solely upon its prior decision in *Raulerson* to support its interpretation of "quiet title" under 2410. *Raulerson* cites to no authority whatsoever in declaring that 2410 applies only to "actual" quiet title actions. Nor does *Raulerson* define what an "actual" quiet title action is, other than concluding that the dispute at issue in that case was not one. It is important to remember that in *Raulerson*, the Plaintiff neither held any actual or even arguable ownership or lien interest in the property at issue, nor did he claim such an interest. Based on this fact, the only firm conclusion that can reasonably be made from the *Raulerson* decision is that a dispute in which the Plaintiff has no rights and claims no rights whatsoever in the property at issue is not an "actual" quite title action.

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12. Likewise, the court in *United States v. Morrison*, 247 F.2d 285 (5th Cir. 1957) was not concerned with the label ascribed to the cause of action at issue (*i.e.*, whether it was identified as an "actual" quiet title action). Rather, the Fifth Circuit found that, under Section 2410(a)(1):

> The jurisdiction does not depend on the specific relief sought, i.e. foreclosure. Rather it rests on the existence of the traditional controversy in which a private party asserts an ownership which is superior to the claimed lien of the United States Government.

Id. at 290.

See Progressive, supra. Petitioner would agree with such a holding. However, under this reading of *Raulerson*, the dispute over the property at issue in the present case is an "actual" quiet title action. Therefore, by finding that the current dispute is not a quiet title action under 2410, the Eleventh Circuit has narrowed its interpretation of the scope of sovereign immunity under 2410 far beyond even its holding in *Raulerson*. The Eleventh Circuit cites to no legal authority which might support such an extreme interpretation of the statute's plain language.

The Eleventh Circuit has held that 2410(a)(1) is exceptionally narrow in scope and encompasses only "actual" quiet title actions, which does not include either most ownership disputes or disputes concerning the validity and priority of liens.[13] This holding conflicts with holdings of: the First Circuit as per *Progressive, supra*; the Fifth Circuit, as per *Estate of Johnson, supra*, (action to determine priority of liens on property is an action to quiet title under 2410), and *Morrison, supra*; the Eighth Circuit, as per *Harmon v. United States*, 101 F.3d 574, 586 (8th Cir. 1996) (citing *Progressive, supra*, regarding scope of sovereign immunity under 2410(a)(1)); the Ninth Circuit, as per *United States v. Coson*, 286 F.2d 453, 457 (9th Cir. 1961) ("it is plain that the words 'quiet title' used in subdivision (a) in that section are not intended to refer to a suit to quiet title in the limited sense in which that term is sometimes used . . ."); and, the Seventh Circuit, as per *Harrell v. United States*, 13 F.3d 232, 234 (7th Cir. 1993) ("if the government claims a lien in [the

13. The dispute in the present action, held by the Eleventh Circuit not to be within the purview of 2410(a)(1), is an ownership dispute. Even if characterized as a dispute over the validity and priority of liens, it would fall within 2410 as per *Progressive, Morrison* and the cases citing thereto.

taxpayer's wages] by virtue of a levy, the sorting out of competing property claims that is then required is just the task for which the quiet-title act was designed."). Such an extensive conflict requires review by this Court.

III. The Decision of the Eleventh Circuit Creates Uncertainty as to the Procedures to be Followed in Disputes Over Property Rights to Which the United States Has Been Named a Party and Imposes Unreasonable Burdens Upon Those Seeking to Divest a Government Lien.

The purpose of Section 2410(a)(1) is to allow an action to be brought by a private party to resolve ownership or lien priority disputes with the government. *Progressive Consumers Fed. Credit Union v. United States*, 79 F.3d 1228 (1st Cir. 1996); *Estate of Johnson v. United States*, 836 F.2d 940 (5th Cir. 1988); *United States v. Brosnan*, 363 U.S. 237, 80 S. Ct. 1108, 4 L. Ed. 2d 1192 (1960). The ordinary determination of priority interests as between a private party and the United States obviously would not require a public sale of the underlying property, and in most cases the prevailing private party would likely have no desire to see its property go to public auction. Consistent with this reality, a party bringing an action pursuant to Section 2410(a)(1) may (and should) have competing ownership and/or lien interests determined without resort to a judicial sale of the underlying property. *See* 28 U.S.C. § 2410(c).

However, an entirely different situation is presented where a party seeks to initiate foreclosure proceedings against the United States. When a foreclosure action is initiated, the United States may be named a party and will waive its sovereign immunity to such a suit *provided that* the

underlying property is sold at public sale. 28 U.S.C. § 2410(c). This also is consistent with the statutory schemes contained within most states providing for a sale on the "courthouse steps" of property subject to a foreclosure action.

However, the Eleventh Circuit, by its decision in the present action, has created a situation where parties bringing an action against the United States involving ownership or lien rights is left unsure as to whether a public sale of the underlying property is required, and whether the waiver of sovereign immunity against the United States will be maintained. Now it appears that those involved in disputes over property rights with the government within the Eleventh Circuit, or within those Circuits which have not ruled upon the issue, will be forced to somehow make a determination as to whether their action might qualify as one to quiet title within Section 2410(a)(1) or one in foreclosure pursuant to Section 2410(a)(2). This is especially problematic where, as here, the dispute concerns personal (as opposed to real) property.[14] As the Eleventh Circuit has failed to define what an "actual" quiet title action is, it is unclear how parties are supposed to determine which of the above-referenced two sections its dispute may fall under. A mistake in classifying the type of action by the private party might be fatal, as it may result in eliminating the United States waiver of sovereign immunity.

Following the Eleventh Circuit's decision in this case, it appears most actions involving ownership disputes or lien priority disputes will be labeled as foreclosure actions, despite

14. Indeed, the primary intent of the 1942 amendment to Section 2410 which first added the "quiet title" language was to broaden the statute to include personal property. *See* discussion in *Estate of Johnson*, 836 F.2d at 943.

the fact that they are not brought under a state foreclosure law and are nether initiated as nor intended to be foreclosure proceedings.[15] The danger and absurdity of this result is apparent in the facts of the present case. MAGIC CHEF repossessed the goods at issue pursuant to § 713.15, which affirms that the party repossessing the goods takes possession as owner and not as lien holder. The statute neither contemplates nor provides any mechanism for public sale of the underlying property. In this context, a judicial sale will obviously be an unnecessary, needless and unproductive act as title to the goods have already been judicially and statutorily determined. Not to mention that a bond had been posted in double the amount of the value of the property in question to protect any interest of the government in the property.

The recognition that most lien priority and ownership disputes are not consistent with foreclosure actions and public sales is one of the reasons that other Circuit Courts of Appeals considering these issues have found that these type of disputes must fall within the purview of Section 2410(a)(1).[16] Review by this Court is needed for the purpose of providing guidance to private property owners as to how to proceed with claims against the government under Section 2410.

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15. It is well established that the Federal Courts must learn to look to State law in determining the nature of the property rights at issue in evaluating the scope of sovereign immunity under Section 2410. *United States v. Brosnan*, 363 U.S. 237, 250, 80 S. Ct. 1108, 1116 (1960); *Estate of Johnson v. United States*, 836 F.2d 940 (5th Cir. 1988).

16. *See Morrison, supra.* at 290-91 ". . . if it is established to a judicial certainty that nought would be gained by a judicial sale, nought would be lost by declining to compel a needless, unproductive act." *Id.* at 291.

IV. The Decision of the Eleventh Circuit Conflicts With the Established Precedent of this Court Regarding the Interpretation of Statutory Waivers of Sovereign Immunity in General and of Section 2410 in Particular.

"A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text." *Lane v. Pena*, 518 U.S. 187, 192, 116 S. Ct. 2092, 2096, 135 L. Ed. 2d 486 (1996) (citations omitted); *See also United States v. Williams*, 514 U.S. 527, 531, 115 S. Ct. 1611, 1616, 131 L. Ed. 2d 608 (1995). 28 U.S.C. § 2410(a)(1) clearly qualifies as such an unequivocal waiver.

Waivers of sovereign immunity by the United States will be strictly construed and ambiguities will be construed in favor of immunity. *Id.* In order to determine the proper scope of a statutory waiver of sovereign immunity, the Court must look to the plain meaning of the statutory language. *Id.* Where a statutory waiver of sovereign immunity contains broad language, the Court must give effect to the breadth of the waiver intended by the legislature. *Williams*, *supra.*

In *Williams*, the Court considered "whether the waiver of sovereign immunity in Section [Title 28] 1346(a)(1) authorized a refund suit by a party who, though not assessed a tax, paid the tax under protest to remove a federal tax lien on her property." *Id.* at 531, 1615. While recognizing that it could not enlarge the waiver of sovereign immunity beyond the purview of the language contained within the statute, this Court concluded it was required to interpret 1346(a)(1) in a manner consistent with its broad statutory language, "which

mirrors the broad common-law remedy the statute displaced." *Id.* at 531-32, 1615-16.[17]

As with Section 1346(a)(1), the language of 28 U.S.C. § 2410(a)(1) is intentionally broad and the natural meaning of the phrase "quiet title" is necessarily broad in scope. " '[The statute's] only apparent purpose is to lift the bar of sovereign immunity which had theretofore been considered to work a particular injustice on private lienors.' " *Estate of Johnson v. United States* 836 F.2d 940, 944 (5th Cir 1988) (quoting from *United States v. Brosnan*, 363 U.S. 237, 246, 80 S. Ct. 1108, 1114, 4 L. Ed. 2d 1192 (1960)) This fact has been recognized by virtually all of the courts which have considered the meaning of "quiet title" within the scope of 2410, and is consistent with this Court's guidelines regarding the proper interpretation of statutory waivers of sovereign immunity. *Williams*, *supra*; *Pena*, *supra*.

In contrast, the Eleventh Circuit in the present case has failed to give the phrase "quiet title" its plain and intended

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17. *See also Williams, supra* at 541, 1620 (Justice Scalia, concurring); The rule requiring a clear statement of waivers of sovereign immunity

> does not, however, require explicit waivers to be given a meaning that is implausible — which in my view would be the result of restricting the unequivocal language of Section 1346(a)(1) . . . "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366, 383 70 S.Ct. 207, 216, 94 L.Ed. 171 (1949)(quoting *Anderson v. Hayes Constr. Co.*, 243 N.Y. 140, 147, 153 N.E. 28, 29-30 (1926) (Cardozo, J.)).

meaning and has failed to follow the precedents of this Court regarding the interpretation of statutory waivers of sovereign immunity in general and of Section 2410 in particular. *See Williams, supra, Brosnan, supra.* Instead, the Eleventh has adopted an extraordinarily narrow, restrictive and unworkable interpretation of "quiet title" within 2410(a)(1). According to the Eleventh Circuit, an action involving disputed liens (including tax liens) is not an action to quiet title within 2410(a)(1). Nor are actions (like the present one) involving private entities in possession of and claiming a statutorily mandated ownership interest in goods, versus a lien interest claimed by the government. This begs the question as to what the Eleventh Circuit considers an "actual" quiet title action to be, and what type of dispute might fit within the very narrow 2410 parameters which the Eleventh Circuit has now established.[18] The Eleventh Circuit, in departing from the precepts of this Court regarding interpretation of statutory sovereign immunity, has created substantial confusion regarding the United States' sovereign immunity waiver under Section 2410 which can only be rectified through immediate certiorari review.

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18. As noted previously, while holding that the dispute in the present action in not an "actual" quiet title action within the meaning of 2410, the Eleventh Circuit has not provided any definition of or guidance regarding what constitutes an "actual" suit to quiet title, either in its current decision or within its holding in *Raulerson*.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED JUNE 26, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-13158
D.C. Docket No. 92-06211-CV-WDF

MAGIC CHEF COMPANY,

Plaintiff-counterdefendant-Appellee,

versus

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Defendant-counterclaimant-Appellant.

On Appeal from the United States District Court
For the Southern District of Alabama

(June 26, 2001)

Before BARKETT and WILSON, Circuit Judges, and GEORGE*, District Judge.

GEORGE, Senior District Judge:

Bonaventure Retirement Service Center (the "Center") is an adult congregate living center. In 1987, the original

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* Honorable Lloyd D. George, District Judge for the District of Nevada, sitting by designation.

owner of the Center, Bonaventure Retirement Associates ("Bonaventure"), financed the construction of the Center with a mortgage insured by the United States Department of Housing and Urban Development ("HUD"). The mortgage lender's security interest included all personalty and fixtures relating to the Bonaventure project, including after-acquired property. That security interest was perfected by filing. Subsequently, through a series of reassignments, HUD became the successor in interest to the lender's security interest in personalty and fixtures at the project.

In 1986 and 1987, Magic Chef Company ("Magic Chef") contracted with Bonaventure for sale of 281 refrigerators and 282 ranges for the project. Magic Chef supplied order forms for the appliances, which were not signed by Bonaventure. After Magic Chef delivered the appliances, Bonaventure failed to pay for them, and in 1989, Magic Chef filed a materialman's lien relating to the goods under Fla. Stat. Ann. § 713.08.

In 1990, Magic Chef sued Bonaventure and its general partners in state court to foreclose on the materialman's lien. HUD was not a party to that suit. Shortly thereafter, Bonaventure defaulted on the mortgage, and HUD took possession of the project site and personalty. In 1991, the state court in the lien-foreclosure action entered a consent judgment based on a stipulation in which Bonaventure agreed to assist Magic Chef in voluntary repossession of the appliances. HUD, who was not a party to the stipulation or consent judgment, refused to give Magic Chef consent to repossess the appliances.

Appendix A

In 1992, Magic Chef filed the instant action in state court against HUD for replevin under Fla. Stat. Ann. §§ 78.01[2] and 713.15[3]. Before service of the complaint on HUD, the

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2. Fla. Stat. Ann. § 78.01 provides:

> Any person whose personal property is wrongfully detained by any other person or officer may have a writ of replevin to recover said personal property and any damages sustained by reason of the wrongful taking or detention as herein provided. Notice of lis pendens to charge third persons with knowledge of plaintiff's claim on the property may be recorded.

3. Fla. Stat. Ann. § 713.15 provides:

> If for any reason the completion of an improvement is abandoned or though the improvement is completed, materials delivered are not used therefor, a person who has delivered materials for the improvement which have not been incorporated therein and for which he has not received payment may peaceably repossess and remove such materials or replevy the same and thereupon he shall have no lien on the real property or improvements and no right against any persons for the price thereof, but shall have the same rights in regard to the materials as if he had never parted with their possession. This right to repossess and remove or replevy the materials shall not be affected by their sale, encumbrance, attachment, or transfer from the site of improvement, except that if the materials have been so transferred, the right to repossess or replevy them shall not be effective as against a purchaser or encumbrancer thereof in good faith whose interest therein is acquired after such transfer from the site of the improvement or as against a creditor attaching

(Cont'd)

state court issued an ex parte prejudgment writ of replevin pursuant to Fla. Stat. Ann. § 78.068[4], and Magic Chef entered the premises and repossessed the appliances. Magic Chef then resold the appliances in a private sale to a third party. After service of the complaint, HUD removed the action to federal court, answered the complaint, and filed its counterclaims for conversion, abuse of process and wrongful replevin pursuant to 28 U.S.C. § 1345.

(Cont'd)

after such transfer. The right of repossession and removal given by this section shall extend only to materials whose purchase price does not exceed the amount remaining due to the person repossessing but where materials have been partly paid for, the person delivering them may repossess them as allowed in this section on refunding the part of the purchase price which has been paid.

4. Fla. Stat. Ann. § 78.068 provides in pertinent part:

(1) A prejudgment writ of replevin may be issued and the property seized delivered forthwith to the petitioners when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts shown by the verified petition or by separate affidavit of the petitioner.

(2) This prejudgment writ of replevin may issue if the court finds, pursuant to subsection (1), that the defendant is engaging in, or is about to engage in, conduct that may place the claimed property in danger of destruction, concealment, waste, removal from the state, removal from the jurisdiction of the court, or transfer to an innocent purchaser during the pendency of the action or that the defendant has failed to make payment as agreed.

Appendix A

The district court (Ungaro-Benages, J.) originally dismissed Magic Chef's claim for replevin after concluding that the action should be viewed as a suit to foreclose a lien under 28 U.S.C. § 2410(a)(2) and that Magic Chef had not complied with the judicial sale requirement of that statute. After Magic Chef filed its amended complaint, the district court (Ferguson, J., to whom the case was transferred) dismissed HUD's abuse of process and wrongful replevin counterclaims and granted summary judgment to Magic Chef in all other aspects. The district court agreed with Magic Chef's characterization of its claim as one to quiet title not subject to the public sale requirement of section 2410(c). The district court further held that HUD was estopped from asserting its interest in the appliances because it did not seek to reopen the state lien foreclosure action to challenge the state court's jurisdiction.

HUD filed a motion to vacate, alter or amend the judgment, and the district court entered an order correcting the order on motions for summary judgment, holding that the appliances in dispute fell outside the scope of Florida's materialman's statute because they were not intended to be incorporated, requiring only that they be plugged in to become functional. Magic Chef then filed a motion for relief from the order, and the district court entered an order vacating correcting order on motions for summary judgment, and reinstated the order dismissing HUD's counterclaims and granting Magic Chef's motion for summary judgment.

We review de novo the district court's grant of summary judgment and rulings on issues of sovereign immunity. *Am. Bankers Ins. Co. of Florida v. Northwestern Nat'l Ins. Co.*,

198 F.3d 1332, 1334 (11th Cir. 1999); *Tinney v. Shores*, 77 F.3d 378, 383 (11th Cir. 1996).

I. *Magic Chef's Replevin Claim*

HUD argues that because Magic Chef did not comply with the public sale requirement of § 2410, Magic Chef's claim that it was entitled to replevin falls outside the United States' waiver of sovereign immunity, and therefore the district court was without jurisdiction in adjudicating it. Magic Chef responds that it is not bound by the public sale requirement because the action is one to quiet title, not to foreclose a lien.

Title 28 U.S.C. § 2410(a) provides in pertinent part:

> Under conditions prescribed in this section and section 1444 of this title for the protection of the United States, The United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter —
>
> (1) to quiet title to,
>
> (2) to foreclose a mortgage or other lien upon,
>
> . . .
>
> real or personal property on which the United States has or claims a mortgage or other lien.

Section 2410(c) requires that "an action to foreclose a mortgage or other lien, naming the United States as a party

under this section, must seek judicial sale." The Supreme Court has held that § 2410 is "the only way in which the United States can be joined" in such an action, and that the conditions set forth in §2410 "must be strictly observed" for the government's waiver of sovereign immunity to be effective. *United States v. John Hancock Mut. Ins. Co.*, 364 U.S. 301, 303, 306 (1960).

In *Raulerson v. United States*, 786 F.2d 1090, 1091 (11th Cir. 1986), this court ruled that "section 2410 waives sovereign immunity only in *actual* quiet title actions, not suits analogous to quiet title actions." In the district court's reinstated order granting Magic Chef's motion for summary judgment on the complaint and HUD's counterclaim, however, the district court found that a broadened definition of "quiet title" should apply to Magic Chef's action pursuant to Fla. Stat. Ann. §§ 78.01 and 713.15 (citing *Brightwell v. United States*, 805 F. Supp. 1464 (S.D. Ind. 1992) (taxpayer's challenge to federal tax lien stated valid action to quiet title)). We disagree.

The quiet-title component of § 2410 rests on "a controversy as to who has title to the property." *Raulerson*, 786 F.2d at 1091. *See also United States v. Morrison*, 247 F.2d 285, 290 (5th Cir. 1957) ("The jurisdiction [established by § 2410] rests on the existence of the tradition controversy in which a private party asserts an ownership which is superior to the claimed lien of the United States Government."). On appeal, Magic Chef argues that in this action it was not seeking to divest HUD's valid but junior lien upon the appliances in which Magic Chef had a senior interest, but was trying to extinguish whatever interest HUD had from Magic Chef's ownership interest established by § 713.15.

The difficulty with Magic Chef's argument, however, is that while the operation of § 713.15 "restores ownership" of unpaid-for materials, *see Matter of Lowery Bros., Inc.*, 589 F.2d 851, 858 (5th Cir. 1979)[5], it does not involve a controversy over Magic Chef's title to the property in the face of HUD's opposing interest. Rather, § 713.15 creates a lien-like right in the materials because of the abandonment or completion of the improvements, which "can be enforced without the invocation of any judicial process (so long as the supplier chooses to employ peaceful repossession, rather than replevin, as his remedy)." *Id.* at 859-61; *see also Florida Fed. Sav. and Loan Assn. v. Britt's, Inc.*, 455 So.2d 1345, 1346 (Fla. Dist. Ct. App. 1984) ("[S]ection 713.15 provides an equitable means by which a supplier may recover furnished materials and have a superior status over all other creditors."). The alternative remedies available under § 713.15 "are closely tied to that which is clearly denominated as a lien in the Florida Mechanic's Lien Law." *Lowery Bros.*, 589 F.2d at 859.

Here, Magic Chef does not claim that it had title to the appliances while they were in Bonaventure's and HUD's possession.[6] Indeed, pursuant to § 713.15, Magic Chef did

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5. The Eleventh Circuit has adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

6. In the consent judgment in the previous state court lien-foreclosure action, Magic Chef stipulated that Bonaventure was the beneficial owner of the appliances. Moreover, in its order correcting order on motions for summary judgment, the district court (Cont'd)

not acquire a statutory lien on the appliances until the abandonment of the Bonaventure project, which it then could enforce by either repossession or replevin. *Id.* at 860. This mechanism for revesting title is similar to a lien foreclosure action inasmuch as title may be revested in a one-time owner of property who transfers title to a purchaser but retains a security interest in the property. The fact that title revests, however, does not convert the foreclosure into a quiet title action.

Furthermore, while § 713.15 statutorily restores title to goods that are peacefully repossessed "without the invocation of judicial process," *id.*, in this case Magic Chef resorted to an action for replevin to enforce its statutory lien on the appliances. In Florida, replevin "is strictly a possessory action where the sole legal issue is the right of immediate possession, not ownership or title." *Williams Mgmt. Enters., Inc. v. Buonauro*, 489 So.2d 160, 164 (Fla. Dist. Ct. App. 1986). Thus, Magic Chef's use of replevin further distances this suit from a quiet title action in which ownership is asserted.

Magic Chef argues that construing § 713.15 as a lien-foreclosure provision would render meaningless the concept

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in analyzing whether Magic Chef had a superior interest to HUD's made a factual finding that Magic Chef had "failed to make a showing that it retained any title to the property at the time of the sale to Bonaventure." The district court subsequently vacated that order, and reinstated its order which did not rest on a determination of ownership, but on the court's appraisal that federal law granted section-2410 jurisdiction to adjudicate the competing lien claims in this case.

that the party repossessing and removing or replevying materials retains "no lien on the real property or improvements and no right against any persons for the price thereof, but shall have the same rights in regard to the materials as if he or she had never parted with their possession." On the contrary, the creation of a lien and the revesting of title upon repossession and removal or replevy under § 713.15 is consistent with a lien foreclosure action, which divests junior liens and grants title to a senior interest holder. Furthermore, both a lien foreclosure action and replevy under § 713.15 — which was pursued by Magic Chef here — require judicial action before title is acquired by the lien holder. *See Lowery Bros.*, 589 F.2d at 860-61. Therefore, we conclude that Magic Chef's suit would not fall within the "actual" quiet-title construct of § 2410.

Neither *Progressive Consumers Fed. Credit Union v. United States*, 79 F.3d 1228 (1st Cir. 1996), nor *United States v. Morrison*, 247 F.2d 285 (5th Cir. 1957), cited by Magic Chef, change this conclusion. These cases held that § 2410 provided jurisdiction to secure a declaration as to priorities over government tax liens. They do not deal with the creation of a lien in a non-title holder and the subsequent vesting of title through repossession or replevy as propounded by § 713.15. In fact, the *Progressive* court distinguishes *Raulerson*'s limited recognition of section-2410 jurisdiction to "actual" quiet title actions on the very ground that the *Raulerson* plaintiff, like Magic Chef here, claimed no ownership interest upon seeking relief. 79 F.3d at 1233.

Finally, Magic Chef asserts that even if the district court lacked jurisdiction pursuant to § 2410, it retains jurisdiction

pursuant to 12 U.S.C. § 1702. Section 1702 provides that in carrying out the National Housing Act, the Secretary of Housing and Urban Development may sue and be sued in any court of competent jurisdiction. Section 1702, however, is not an independent source of jurisdiction, and "requires another statute to grant jurisdiction in order to make a court competent to hear a case against the Secretary." *Indus. Indem., Inc. v. Landrieu*, 615 F.2d 644, 647 (5th Cir. 1980). In any event, the Supreme Court has held that a § 2410 action is the exclusive means for suing the government in a lien-foreclosure action. *John Hancock Mut. Ins. Co.*, 364 U.S. at 303. Accordingly, whereas Magic Chef's replevin suit cannot be construed as one to quiet title, and because Magic Chef did not comply with the judicial sale requirement of lien foreclosure actions under § 2410, there was no waiver of the United States' sovereign immunity to suit.

II. *HUD's Counterclaims*

The district court has jurisdiction over HUD's counterclaims for conversion and wrongful replevin independent of § 2410. *See* 28 U.S.C. § 1345. Therefore, insofar as Magic Chef was statutorily barred from bringing a replevin action against the United States by not seeking a judicial sale of the appliances, the district court erred by not granting judgment to HUD on its counterclaims for conversion and wrongful replevin.[7] *See* Fla. Stat. Ann.

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7. On appeal, Magic Chef also asserts that HUD is not entitled to affirmative relief on its counterclaims because it has not filed a motion for summary judgment. The record indicates that HUD filed a motion to dismiss or for summary judgment on June 14, 1993, and

(Cont'd)

§ 78.21[8]; *McMurrain v. Fason*, 584 So.2d 1027, 1034 & n.8 (Fla. Dist. Ct. App. 1991) (the wrongful sale of property obtained under a prejudgment writ of replevin is a conversion under Florida law), *review denied*, 592 So.2d 680 (Fla. 1991).

We REVERSE the district court's grant of summary judgment in favor of Magic Chef, and REMAND for dismissal of Magic Chef's action, entry of judgment in favor of HUD on its counterclaims for conversion and wrongful replevin, and a determination of appropriate remedies.

(Cont'd)
a motion for summary judgment on April 8, 1996, as Exhibit 1 to its memorandum supporting its motion to vacate the order initially granting summary judgment to Magic Chef. The district court denied Magic Chef's motion to strike the exhibits to that memorandum. Therefore, HUD's request for summary judgment on the substance of its counterclaims was before the district court.

8. Fla. Stat. Ann. § 78.21 provides:

> When the property has not been retained by, or redelivered to, defendant and he or she prevails, judgment shall be entered against plaintiff for possession of the property and costs and against plaintiff for the value of the property and costs in the same manner as provided in § 78.19 for judgment in favor of plaintiff. The value of each article of the goods replevied shall be found as directed in § 78.19 with the same exception. The remedies provided in § 78.20 and this section shall not preclude any other remedies available under the laws of this state.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA VACATING CORRECTING ORDER ON MOTIONS FOR SUMMARY JUDGMENT DATED JULY 23, 1999 AND FILED JULY 27, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-6211-CIV-FERGUSON

MAGIC CHEF COMPANY,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Defendant.

ORDER VACATING CORRECTING ORDER ON MOTIONS FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court on Plaintiff's Motion for Relief From and/or to Amend Order Correcting Order on Motions for Summary Judgment [D.E. 285].

This case was removed to federal court in 1992. Since that date, the case has been handled by Judge Roettger, then transferred to Judge Ryskamp, reassigned to Judge Ungaro-Benages, and finally transferred to this Court.

On March 27, 1996, this Court signed the Order on Motions for Summary Judgment, granting the Plaintiff's Motion for Summary Judgment on both the complaint and

counterclaims. Following this Order, the Defendant filed a Motion to Vacate, Alter or Amend Judgment on April 15, 1996. After considering the motion along with new oral argument, this Court entered an Order Correcting Order on Motions for Summary Judgment on September 30, 1998 [D.E. 284]. The Plaintiff then filed a Motion for Relief From and/or to Amend Order on October 16, 1998, contending essentially, that the Court's original order was correct and that the second order is based on a misapprehension of the facts and applicable law. Having reviewed the motion, response, and pertinent parts of the record, it is agreed that the law as stated in the latter order is incorrect.

ORDERED AND ADJUDGED that the September 30, 1998 Order Correcting Order on Motions for Summary Judgment is **VACATED**. Upon further review of the entire case history, particularly the undisputed facts, the Court determines that the March 27, 1996 Order on Motions for Summary Judgment [D.E. 265], granting the Plaintiff's Motion for Summary Judgment on both the complaint and the counterclaims, was correct. The September 30, 1998 Order is **VACATED** and the March 27, 1996 Order is **REINSTATED**. **The Final Judgment shall be re-entered.**

NO FURTHER MOTIONS ADDRESSED TO THE MERITS OF THIS ORDER OR THE FINAL JUDGMENT SHALL BE ENTERTAINED.

DONE AND ORDERED in Chambers at Ft. Lauderdale, Florida, this 23rd day of July, 1999.

s/ Wilkie D. Ferguson, Jr.
WILKIE D. FERGUSON, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED AND FILED JULY 31, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-6211-CIV-FERGUSON

MAGIC CHEF COMPANY,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Defendant.

FINAL JUDGMENT

IN ACCORDANCE with the Court Order Granting Plaintiff's Motion for Summary Judgment, it is

ORDERED AND ADJUDGED that final judgment is hereby entered in favor of the Plaintiff. The Defendant, Magic Chef, shall take nothing in this case. Any pending motions not ruled upon are rendered moot by this final judgment.

DONE AND ORDERED in Chambers at Ft. Lauderdale, Florida, this 31st day of July, 1999.

s/ Wilkie D. Ferguson, Jr.
WILKIE D. FERGUSON, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA CORRECTING ORDER ON MOTIONS FOR SUMMARY JUDGMENT DATED SEPTEMBER 30, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 92-6211-FERGUSON

MAGIC CHEF COMPANY,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Defendant.

ORDER CORRECTING ORDER ON MOTIONS FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court on September 27, 1996, for oral argument on the defendant's motion to vacate, alter or amend the judgment. Defendant's motion is granted, and this Court's March 27, 1996, Order on Motions for Summary Judgment is corrected as follows.

Appendix D

Background

Magic Chef, the plaintiff, sold appliances to a developer, Bonaventure Retirement Center, for use in a newly constructed residential complex. The defendant, United States Department of Housing and Urban Development ("HUD"), as insurer on the loan, took control of the property upon default by Bonaventure. Magic Chef brought suit against HUD in state court, suing for replevin of select appliances under section 713.15, Florida Statutes, and was granted an *ex parte* prejudgment writ of replevin by that Court after posting bond in the amount of $300,000. The suit was removed to this Court by HUD, which asserted sovereign immunity to Magic Chef's replevin action.[1] HUD also filed a counterclaim on theories of conversion, abuse of process,[2] and wrongful replevin. The appliances, now having been sold by Magic Chef, HUD seeks to collect against the $300,000 bond for wrongful replevin.

Complaint

At the time of the foreclosure, the appliances replevied in this action had not been incorporated into the Bonaventure Center. The Court previously determined that as a supplier of the goods, Magic Chef was entitled to possession of all non-incorporated goods as payment had not been made. *See* Fla. Stat. § 713.15.

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1. Jurisdictional findings made in the March 27, 1996, order are unchanged.

2. This count of the counterclaim was dismissed by the Court on February 8, 1996.

Appendix D

Upon reconsideration, it is determined that Chapter 713 is not a remedy available to the plaintiff. The availability of replevin as a remedy for retaking possession of material to be used as part of real property turns on (1) whether the goods are the type intended by the legislature to fall within this statute; and (2) whether the goods have, in fact, been incorporated into the property. First, the replevin statute has defined "materials" as those which are incorporated in the improvement, specially fabricated for incorporation into the improvement, those used for the construction and not remaining in the improvements, and tools used on the improvement to the extent of the reasonable rental value. *See* Fla. Stat. § 713.06(6). Second, the property must not have *in fact* been incorporated, as only non-incorporated materials may be replevied under section 713. This Court's previous ruling was based on the second factor, finding that the ranges and refrigerators had not been incorporated into the building and could, therefore, be replevied.

This Court now finds that the electric ranges and refrigerators at issue here fail to satisfy the first part of the above test, not being of the type of materials which were intended to be incorporated, and thus outside the scope of Chapter 713. In *Florida Federal Savings and Loan Ass'n v. Britts, Inc.*, 455 So. 2d 1345. (Fla. 5th DCA 1984), the Court found that a cooktop stove, a wall oven, a microwave oven, and an automatic dishwasher were incorporated into the premises because they were affixed by screws and wires and were installed for permanent use. They are distinguishable from the electric ranges and refrigerators in this case, which need only be plugged in to be operative and could be easily delivered after construction was completed. Accordingly, replevin under section 713.15 is not an appropriate remedy.

Appendix D

Further, Plaintiff has failed to make a showing that it retained any title to the property at the time of the sale to Bonaventure. One employee of the plaintiff, Mr. Deemer, who was in position to know, testified at deposition that he was unaware of any retention by Magic Chef or an ownership interest in the goods. In light of the facts presented, the Court finds that (1) replevin under section 713.15 is not an available remedy to the plaintiff; and (2) plaintiff has failed to show any ownership interest superior to that of the defendant which would entitle it to take possession of the goods. Accordingly, plaintiff's motions for summary judgment are denied.

Counterclaim

The finding here that Chapter 713 is unavailable as a remedy and that Magic Chef retained no title to the property supports HUD's claims of a superior security interest arising from foreclosure on the property. Further, it is undisputed that Magic Chef has sold the subject property. Plaintiff's defenses to HUD's counterclaim, having been found without merit, its motion for summary judgment on the counterclaim is also **DENIED**.

DONE and ORDERED in Chamber at Ft. Lauderdale, Florida, this 30th day of September, 1998.

s/ Wilkie D. Ferguson, Jr.
WILKIE D. FERGUSON, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX E — ORDER AND FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA ON MOTIONS FOR SUMMARY JUDGMENT DATED AND FILED MARCH 27, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-6211-CIV-FERGUSON

MAGIC CHEF COMPANY,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Defendant.

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court on March 18, 1996 for calendar call. The Court heard argument on the remaining dispositive issues.

Background

Plaintiff, Magic Chef, sold appliances to a buyer, Bonaventure Retirement Center, for use in a residential complex. When the project failed before completion, with the appliances not paid for, Magic Chef sued the buyer for possession under Florida's replevin statute, Chapter 78, and the Mechanic's Lien Statute, Section 713.15. The suit was

settled by terms of a July 9, 1991 Stipulation and Agreement, executed by Magic Chef and Ireland Financial Group, Inc., as general partner of Bonaventure. As part of the Stipulation and Agreement, Ireland Financial agreed to Magic Chef's repossession of all appliances delivered by Magic Chef to Bonaventure. In an Order approving the settlement and dismissing the action, the state trial Court reserved jurisdiction to reopen the case if there was a challenge to the disposition.

The defendant in this suit, the United States Department of Housing and Urban Development ("HUD"), subsequently took control of the project after the developers defaulted.[1] HUD ignored the Court-approved settlement agreement between Magic Chef and Bonaventure, and refused to return the subject appliances. As provided for in section 713.15, Florida Statutes, Magic Chef brought suit against HUD to replevy the appliances. The complaint was filed in The Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida, where Magic Chef requested and was granted an *ex parte* prejudgment writ of replevin by that court after posting bond in the amount of $300,000. Shortly thereafter, Magic Chef entered the premises and took possession of the goods. The suit was removed to this Court upon petition by HUD, which asserted sovereign immunity to Magic Chef's replevin action and filed a counterclaim on theories of conversion, abuse of process,[2] and wrongful replevin.

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1. HUD was the insurer on the loan.

2. This count of the counterclaim was dismissed by the Court on February 8, 1996.

Appendix E

Jurisdiction

This Court has jurisdiction over Magic Chef's complaint pursuant to 28 U.S.C. § 2410. That section provides

> (a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter —
>
> (1) to quiet title to,
>
> (2) to foreclose a mortgage or other lien upon,
>
> . . . .
>
> real or personal property on which the United States has or claims a mortgage or other lien.

The Court reconsiders the previous finding that Magic Chef's repossession of the appliances was in the nature of a foreclosure action,[3] finding instead that it should be treated as a suit to quiet title.

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3. Although the ruling was made prior to the transfer of this case to the undersigned, there is authority to revisit the interlocutory order. *Gillig v. Advanced Cardiovascular Systems, Inc.*, 67 F.3d 586 (6th Cir. 1995).

Appendix E

Under section 2410, the government waives its sovereign immunity in both quiet title and foreclosure actions. A party bringing a foreclosure under this section, however, must seek a judicial sale of the underlying property, 28 U.S.C. § 2410(c), a procedure not followed in this case. The pivotal question on the sovereign immunity issue is whether Magic Chef's claim of a right to possession constitutes a quiet title action within the meaning of 28 U.S.C. § 2410(a)(1). HUD argues this is a foreclosure action because Magic Chef's action under section 713.15, Florida Statutes, creates a statutory lien. *See Matter of Lowery Bros., Inc.*, 589 F.2d 851 (5th Cir. 1979). Under federal law, however, the definition of quiet title is somewhat broader than under state law and actions where a party claims their lien has priority, as here, have been considered "quiet title" actions. *Brightwell v. United States*, 805 F.Supp. 1464 (S.D. Ind. 1992). Similarly, this Court has jurisdiction to adjudicate the competing claims as an action to quiet title pursuant to the waiver of sovereign immunity under 28 U.S.C. § 2410.

Complaint

Pending is plaintiff's motion for summary judgment on its claims for relief under Florida's replevin statute, Chapter 78, and the Mechanic's Lien Statute, Section 713.15.[4] On the merits, there are no disputed issues of material fact.

As a supplier of goods, Magic Chef could replevy supplies not paid for which were not incorporated into the improvements. Fla. Stat. §713.15. Federal defendants agree

4. Federal defendants' motion for enlargement of time to respond to plaintiff's motion for summary judgment is denied.

that the plaintiff had not been paid for the appliances. Further, the issue of right of possession of the appliances was settled in a state action where the borrower/developer Bonaventure Retirement Homes entered into a stipulation and agreement that Magic Chef was entitled to possession of the appliances.[5] In an Order approving the settlement and dismissing the action, the state trial Court reserved jurisdiction to reopen the case "if there was a challenge to the disposition." HUD never sought to reopen that case to challenge the Court's jurisdiction over the subject matter or to assert a superior right to the goods. Accordingly, the challenge to Magic Chef's new action for possession on procedural and substantive grounds is without merit and Magic Chef is entitled to possession pursuant to section 713.15, Florida Statutes.

Where relief is sought pursuant to section 713.15, however, possession is the sole remedy available. After taking possession by replevin, the plaintiff "shall have no lien on the real property or improvements and no right against any persons for the price thereof, but shall have the same rights in regard to the materials as if he had never parted with their possession." Fla. Stat. §713.15. Magic Chef's claim for damages, accordingly, must be dismissed.

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5. HUD claims that replevin was inappropriate because the appliances were incorporated into improvements. Although this principle is generally correct, it is subject to an intention of the contracting parties. *Florida Federal Sav. and Loan Assn*, 455 So.2d 145 (5th Cir. 1984). That question of the parties' intent was answered, implicitly, by the settlement agreement between the parties which terminated the first state court action.

Appendix E

Counterclaim

Also pending is plaintiff's motion for summary judgment on the federal defendants' counterclaim which alleges conversion and wrongful retention. The finding here, on undisputed evidence, that the replevin action was proper moots the counterclaim for wrongful replevin. At oral argument, HUD conceded, contrary to its previous contention, that its rights to the goods subject of this controversy, and standing to bring the counterclaim action, emanate from a contract between Bonaventure, its predecessor-in-interest, and Magic Chef. An action in tort is inappropriate where the basis of the suit is breach of an express or implied contract. *Burger King Corp. v. Austin*, 805 F.Supp. 1007 (S.D. Fla. 1992) (quoting *Belford Trucking Co. v. Zagar*, 243 So.2d 646 (Fla. 4th DCA 1971)). Here, HUD claims a superior security interest necessarily arising out of contractual agreements and no independent tort exists. No cause of action for conversion is shown by the evidence. Magic Chef is thus entitled to summary judgment on both the complaint and counterclaims for which a judgment will be entered.

DONE AND ORDERED in Chambers in Miami, Florida this 27th day of March, 1996.

s/ Wilkie D. Ferguson, Jr.
WILKIE D. FERGUSON, JR.
UNITED STATES DISTRICT JUDGE

Appendix E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-6211-CIV-FERGUSON

MAGIC CHEF COMPANY,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Defendant.

FINAL JUDGMENT

On March 27, 1996, this Court entered an Order granting summary judgment in favor of plaintiff Magic Chef on both the complaint and the counterclaims. Accordingly, it is

ORDERED AND ADJUDGED that judgment for replevin is entered for the plaintiff Magic Chef. On the counterclaims, judgment is entered for the plaintiff Magic Chef and the defendants Department of Housing and Urban Development and the Secretary of the Department of Housing and Urban Development shall take nothing in this action. Jurisdiction is reserved to tax costs.

DONE AND ORDERED in Chambers in Miami, Florida this 27th day of March, 1996.

s/ Wilkie D. Ferguson, Jr.
WILKIE D. FERGUSON, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA GRANTING FEDERAL DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DATED JANUARY 4, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-6211-CIV-UNGARO-BENAGES

MAGIC CHEF COMPANY,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Defendant.

ORDER GRANTING FEDERAL DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court upon Defendant United States Department of Housing and Urban Development's ("HUD") Motion to Dismiss, or in the alternative Motion for Summary Judgment which this Court will treat as a Motion for Summary Judgment [D.E. 48].

Magic Chef brought this lawsuit against HUD in the Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida to replevy appliances and to recover damages

for wrongful detention, including depreciation, the costs of removal and attorneys fees. Magic Chef sought and received an ex parte prejudgment writ of replevin by that court and replevied the appliances. HUD removed the action to this court.

The Legal Standard

The procedure for disposition of a summary judgment motion is well established. Summary judgment is authorized only when:

> the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed.R.Civ.P. 56. The party moving for summary judgment has the burden of meeting this exacting standard. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). In applying this standard, the *Adickes* Court explained that when assessing whether the movant has met this burden, the courts should view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. All reasonable doubts about the facts should be resolved in favor of the non-movant. *Adickes*, 398 U.S. at 157.

The party opposing the motion may not simply rest upon mere allegations or denials of the pleadings; after the moving party has met its burden of coming forward with proof of the

absence of any genuine issue of material fact, the non-moving party must make a sufficient showing to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

If the record presents factual issues, the court must not decide them: it, must deny the motion and proceed to trial. *Environmental Defense Fund v Marsh*, 651 F.2d 983, 991 (5th Cir. 1981). Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. *Lighting Fixture & Elec. Supply Co. v. Continental Ins. Co.*, 420 F.2d 1211, 1213 (5th Cir. 1969). If reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment. *Impossible Electronics Techniques, Inc. v Wackenhut Protective Systems, Inc.*, 669 F.2d 1026, 1031 (5th Cir. 1982).

Moreover, the party opposing a motion for summary judgment need not respond to it with any affidavits or other evidence unless and until the movant has properly supported the motion with sufficient evidence. *Adickes*, 398 U.S. at 160. The moving party must demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute, or else summary judgment will be denied notwithstanding that the non-moving party has introduced no evidence whatsoever. *Brunswick Corp. v. Vineberg*, 370 F.2d 605, 611-12 (5th Cir. 1967). The Court must resolve all ambiguities and draw all justifiable inferences in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Appendix F

FACTS

The facts material to the disposition of this motion are mainly undisputed. Viewed in a light most favorable to the non-moving party, the facts are as follows. Bonaventure Retirement Service Center (the "Center") is an adult congregate living center. The original owner of the Center was Bonaventure Retirement Associates ("Associates"), a general partnership. Associates was able to finance the construction of the project with a mortgage insured by HUD because the Center qualified as a section 221(d)(4) project, 28 U.S.C. § 17151(d)(4). The mortgage lender for the construction of the Center was Puller Mortgage Associates ("PMA"), at the time, a HUD-approved coinsurance lender under the section 221(d)(4) program.

The Government National Mortgage Association ("GNMA") financed the PMA loan. On July 28, 1987, City National Bank executed a note and mortgage as trustee on behalf of Associates with PMA for $22,332,400. On that day, the same parties executed a Security Agreement covering all personalty and fixtures. On August 14, 1987, PMA filed a UCC-1 financing statement securing all property connected with the Center.

PMA defaulted on its obligations to GNMA and on July 26, 1989, assigned the mortgage, note and UCC-1 statement to GNMA. On May 23, 1990, GNMA assigned the subject mortgage, the UCC-1, and all its interest to the Secretary of HUD. All the above filings and assignments were properly recorded in the public records of Broward County, Florida. HUD took over possession of the Center in 1990.

Appendix F

Contract with Magic Chef

Although the exact dates are unclear, some time in 1986 and 1987 Magic Chef contracted with Associates (and not HUD) to provide appliances to the Center. Magic Chef delivered the appliances between July 30, 1988 and July 30, 1989. Magic Chef was not paid for the appliances. Magic Chef filed a Claim of Lien on October 4 , 1989, and brought suit to foreclose its lien against Associates in 1990. This lawsuit was settled pursuant to a Stipulation Agreement to which HUD was not a party. As part of that Agreement, Ireland Financial Group, apparently a general partner in Associates, promised to cooperate with Magic Chef to repossess the appliances, but Magic Chef was unable to effect the repossession because HUD was in possession of the property.

Without previously filing an administrative claim against HUD, Magic Chef filed a complaint in the Circuit Court of the Seventeenth Judicial circuit in and for Broward County, Florida on February 7, 1992 for a prejudgment writ of replevin. That same day, a writ was issued after an ex parte hearing (for which HUD had no notice) and Magic Chef's posting of a $300,000 bond. The appliances subject to the writ were 281 refrigerators and 282 ranges. A second writ was issued under similar circumstances a week later. The second writ applied to 134 range hoods and 17 garbage disposals.

On February 11, 1992 , prior to HUD's being served with the complaint, Magic Chef began to remove the replevied appliances from the Center, loaded them onto trucks and sold

them to ARD Distributors via private sale for $119,240. The United States Attorney was served with the complaint on February 14, 1992, after all appliances covered by the writ had been removed from the Center. The suit was removed to this Court upon the petition of HUD.

Legal Analysis

I. Sovereign Immunity — United States' Consent to Suit

It is well settled that the United States may not be sued without its consent. *U.S. v. Mitchell*, 445 U.S. 535, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980); *Stoecklin v. U.S.*, 943 F.2d 42 (11th Cir. 1991). Suits against federal agencies and officers may be barred by the doctrine of sovereign immunity if the conduct in question is on behalf of the government. 14 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 3655 (1985). The absence of consent is a fundamental, jurisdictional defect and, contrary to Magic Chef's contention, may be asserted at any time either by the parties or by the court on its own motion. *See U.S. v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 770, 85 L.Ed.2d 1058 (1941). Only Congress has the power to waive the United States' sovereign immunity. Wright & Miller, *supra* § 3654, and the immunity must be waived in the particular area at issue. *Raulerson v. U.S.*, 786 F.2d 1090, 1091-92 (11th Cir. 1986). The waiver of sovereign immunity must be explicit and will be strictly construed. *U.S. v. Nordic Village*, 112 S.Ct. 1011, 1015 (1992); *Raulerson*, 786 F.2d at 1091.

Appendix F

II. United States' Consent to Foreclosure Suits — 28 U.S.C. § 2410

The first component to Magic Chef's claim is a possessory action for the replevied appliances. Magic Chef seeks to eliminate what it considers to be a junior lienor (HUD) and benefit from the sale of property. In determining whether this court has subject matter jurisdiction over the claims in this case, the court's focus is on whether the government has waived its sovereign immunity and if so, what requirements Magic Chef was obligated to satisfy.

For an agency of the United States to be named as a defendant in this action, Magic Chef must identify a waiver of the United States' sovereign immunity. In this case, the applicable waiver is found in 28 U.S.C. § 2410 which provides in part:

> (a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter —
>
> (1) to quiet title to,
>
> (2) to foreclose a mortgage or other lien upon,

Appendix F

. . . .

> real or personal property on which the United States has or claims a mortgage or other lien.

Section 2410(c) imposes a requirement on those seeking to invoke section 2410(a)(2):

> However, an action to foreclose a mortgage or other lien, naming the United States as a party under this section, must seek judicial sale.

As this court finds that this case involves a foreclosure, *infra*, Magic Chef was obligated to seek a judicial sale pursuant to 28 U.S.C. § 2410(c) and failed to do so. Thus, HUD may successfully rely upon sovereign immunity to defeat Magic Chef's claims.

When a foreclosure sale is not directed by judicial order, it is not a judicial sale as contemplated by section 2410(c). *Kasdon v. U.S.*, 707 F.2d 820, 823 (4th Cir. 1983). Although the parameters of a "judicial sale" are not well-settled, *see U.S. v. Capobianco*, 836 F.2d 808, 816 (3rd Cir. 1988), the sale that occurred in the case *sub judice* must be classified as a private sale which failed to comply with the requirements of 28 U.S.C. § 2410(c). Magic Chef sold directly to a private purchaser without judicial order, decree or judgment and without notice to HUD.

Magic Chef cites to *U.S. v. Morrison*, 247 F.2d 285 (5th Cir. 1957), to support its contention that a judicial sale was not required. The *Morrison* court held that "if it is established

to a judicial certainty that nought would be gained by a judicial sale, nought would be lost by declining to compel, a needless unproductive act." *Id.* at 291. Magic Chef argued at the hearing on November 12, 1993 that the Government suffered no harm by the lack of judicial sale since it had notice of the impending sale, and that a prejudgment bond of $300,000 had been paid by Magic Chef.

The Court rejects these arguments for the following reasons. First, the Fifth Circuit holding in *Morrison* came at time when there was some confusion as to whether section 2410 required a judicial sale in foreclosure cases.[1] Since then, Congress clarified the situation by explicitly requiring a judicial sale so that the government would be notified of the foreclosure. *See Dupnik v. U.S.*, 848 F.2d 1476, 1481 n. 4 (9th Cir. 1988). Thus, the Court finds *Morrison* to be inapplicable.

Moreover, it is clear that the Government was prejudiced by Magic Chef's failure to abide by the judicial sale requirement. It is evident from the facts that Magic Chef began removing appliances from the Center before the United States Attorney was even served with the complaint. Had Magic Chef complied with 28 U.S.C. § 2410(c), HUD would have received notice of the judicial sale and could have protected its interests in the appliances.

---

1. Eventually, the Supreme Court in *United States v. Brosnan*, 363 U.S. 237, 246, 80 S.Ct. 1108, 1114 (1960) held that under the former § 2410 there was no federally imposed requirement that there be a judicial sale at all.

Appendix F

Under 28 U.S.C. § 2410, if the plaintiff fails to seek a judicial sale in foreclosing upon a mortgage or other lien, the action is barred against the United States. *U.S. v. Perpetual Help's Boys Home*, 451 F.Supp. 270, 273 (E.D. Wis. 1978); *Brightwell v. U.S.*, 805 F.Supp. 1464, 1469 (S.D. Ind. 1992) ("If a suit involves foreclosure of a mortgage, a waiver of sovereign immunity will be effective only to the extent that the plaintiff seeks a "judicial sale" of the property — i.e., a sale directed by judicial order, decree, or judgment"); *Kasdon v. G.W. Zierden Landscaping*, 541 F.Supp. 991, 996-97 (D. Md. 1982) *affd.* 707 F.2d 820, 823 (4th Cir. 1983) (foreclosure actions may not pass the barrier of sovereign immunity unless the sales conducted are "judicial sales"; foreclosure, coupled with nonapplicability of 28 U.S.C. § 2410(a)(1) (quiet title action), entitles the United States to successfully assert sovereign immunity.)

Alternatively, Magic Chef argues that the action taken was not a foreclosure but was a replevin action. As replevin is a remedy entirely distinct from foreclosure, Magic Chef argues, 28 U.S.C. § 2410 does not require a judicial sale, and the absence of such a sale provides no basis for dismissal. Since the statute does not list replevin as one of the actions for which the government waives sovereign immunity, presumably Magic Chef seeks to have this Court classify this matter as a quiet title action, under 28 U.S.C. § 2410(a)(1) which does not require a judicial sale.

In a quiet title action, the plaintiff seeks to extinguish some allegedly adverse interest as defective, invalid or ineffective. The facts here, where two valid creditors seek a determination of the priorities of their interests, lend

themselves to the holding that this case involves a foreclosure action, rather than a quiet title action.

The case Magic Chef cites on this issue defeats its own argument. In *Kasdon*, 541 F.Supp. 991, the Court dismissed a 28 U.S.C. § 2410 foreclosure case for failure to hold a judicial sale. The court distinguished between a quiet title action and a foreclosure action as follows:

> A quiet title action is a suit in which a plaintiff seeks a decree that some allegedly adverse interest in his property is actually defective, invalid or ineffective prior to and at the time suit is brought either because the lien was invalidly created, or has become invalid or has been satisfied. . . A foreclosure suit, on the other hand, is brought by a plaintiff to obtain a court decree divesting a valid but junior lien upon the property in which the plaintiff has a senior interest. *Priorities among valid interests are the subject of foreclosure suits; the alleged invalidity of adverse interests are the subject of quiet title actions.*

Kasdon, 541 F.Supp. at 995 (emphasis added). The court held that since valid tax liens of the United States were asserted to be junior to the ownership interests of the plaintiffs, the foreclosure rules were applicable. As such, the plaintiffs could not pass the barrier of sovereign immunity asserted by the United States unless judicial sales were held pursuant to 28 U.S.C. § 2410(c). *Id.* at 996. Since judicial sales were not held the United States successfully asserted sovereign immunity. The facts in the instant case are analogous to a

foreclosure action, governed by 28 U.S.C. § 2410(c). In the absence of a judicial sale, the claim against HUD must be dismissed for failure to satisfy the requirements of the applicable waiver of sovereign immunity.

III. Consent to Suit Under FTCA (28 U.S.C. § 2675) or Tucker and Little Tucker Acts (28 U.S.C. § 1346 and 1491)

In addition to its claim under 28 U.S.C. § 2410, the second component to Magic Chef's claim is for damages for HUD's wrongful detention of the appliances; and for attorneys fees. While there is dispute as to whether these claims sound in tort or contract, under either approach the application of sovereign immunity to the facts of this case prevent this court from asserting jurisdiction over the claims.

HUD asserts that the wrongful detention action sounds in tort. Accordingly, to sue the government in tort, the plaintiff must comply with the limits and conditions of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671 – 2680. In this case, the undisputed evidence is that Magic Chef failed to comply with the FTCA's fundamental requirement of presentation of the tort claim to an appropriate federal agency prior to filing suit as set forth in 28 U.S.C. § 2675(a):

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office of employment, unless the claimant shall have first

> presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency. . .

As Magic Chef failed to exhaust its administrative remedies as required by the FTCA, the Court lacks subject matter jurisdiction over Magic Chef's claims seeking money damages.

Magic Chef would have the court hold that a replevin action is an action sounding in contract, based on, and arising from the contractual rights of the plaintiff. There is case law supporting both the contract and tort views on replevin. Two federal district courts have dismissed replevin actions for failure to satisfy the procedural prerequisite of filing a tort claim with an appropriate federal agency. *See Totaro v. Lyons*, 498 F.Supp. 621, 627 (D. Md. 1980) ("An action in replevin, *i.e.* one to recover property wrongfully appropriated, sounds in tort."); *MacAvox v. The Smithsonian Inst.*, 757 F.Supp. 60, 67 (D.D.C. 1991) ("Although the primary objective of the replevin action (*i.e.* the restoration of possession of property) is different from the traditional tort remedy (*i.e.* money damages), this does not necessarily preclude the classification of replevin as a tort. . . Given that the plaintiff's allegations suggest a claim for conversion rather than replevin and the fact that even replevin, as a restitutionary action, can still be considered a tort, the Court holds that the plaintiff's claim for replevin is an action in tort.")

The Tenth Circuit approached the replevin issue differently when faced with an action in which a depositor sought to recover certificates of deposit after the FDIC offset

the certificates against debts owed by the depositor to an insolvent bank. The Court held that "the relief accorded in the seizure of property remedy of replevin sounds either in tort or in contract or a combination of both." *Farha v. FDIC*, 963 F.2d 283, 288 (10th Cir. 1992). In *Farha*, the Court found that the replevin action sounded in contract, and that the U.S. Court of Federal Claims had exclusive jurisdiction over the action pursuant to 28 U.S.C. § 1346(a)(2).

As no contractual relationship existed between HUD and Magic Chef, the action is more properly characterized as a tort action, and Magic Chef was required to utilize administrative remedies as prescribed by the FTCA. Under either approach, it is clear that this Court does not have jurisdiction over Magic Chef's claims for money damages. Even if this court were to view this as a contract action exclusive jurisdiction would lie in the U.S. Court of Federal Claims pursuant to 28 U.S.C. § 1346(a)(2) and 1491(a)(1).

FOR THE FOREGOING REASONS it is

ORDERED and ADJUDGED that the Motion for Summary Judgment is hereby GRANTED. Accordingly, Magic Chef's claims against HUD are DISMISSED for lack of subject matter jurisdiction.

DONE AND ORDERED in Chambers at Miami, Florida, this 4 day of January, 1994.

s/ Ursula Ungaro-Benages
URSULA UNGARO-BENAGES
UNITES STATES DISTRICT JUDGE

APPENDIX G — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED OCTOBER 12, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99-13158 BB

MAGIC CHEF COMPANY,

Plaintiff-counterdefendant-Appellee,

versus

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Defendant-counterclaimant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

BEFORE: BARKETT and WILSON, Circuit Judges, and GEORGE*, District Judge.

PER CURIAM:

The petitions for rehearing filed by Appellee, Magic Chef Company, is DENIED.

ENTERED FOR THE COURT:

s/ Rose Barkett
UNITED STATES CIRCUIT JUDGE

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* Honorable Lloyd D. George, District Judge for the District of Nevada, sitting by designation.